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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 JOHN S. DEPETRO,)
7 Plaintiff,) No. CV-08-248-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on October 16, 2009 (Ct. Rec.
15 17, 23). Attorney Maureen J. Rosette represents Plaintiff;
16 Special Assistant United States Attorney Thomas M. Elsberry
17 represents the Commissioner of Social Security ("Commissioner").
18 Plaintiff filed a reply brief on August 7, 2009 (Ct. Rec. 25).
19 The parties have consented to proceed before a magistrate judge
20 (Ct. Rec. 8). After reviewing the administrative record and the
21 briefs filed by the parties, the court **GRANTS** Defendant's Motion
22 for Summary Judgment (Ct. Rec. 23) and **DENIES** Plaintiff's Motion
23 for Summary Judgment (Ct. Rec. 17).

24 **JURISDICTION**

25 Plaintiff protectively filed an application for supplemental
26 security income (SSI) on March 26, 2002. He alleged onset as of
27 December 31, 1973, later amended to March 26, 2002. (Tr. 62-64,
28

1 85, 642-643.) Plaintiff alleged disability due to post-traumatic
2 stress disorder (PTSD) and depression (Tr. 76). In 2004, Mr.
3 Depetro additionally alleged he suffers from sleep disturbance and
4 antisocial personality disorder (Tr. 388). The application was
5 denied initially and on reconsideration (Tr. 26-29, 32-34).

6 At the first hearing before Administrative Law Judge (ALJ) R.
7 J. Payne on October 7, 2003, plaintiff, represented by counsel,
8 and psychological expert Ronald Klein, Ph.D., testified (Tr. 286-
9 309). On October 16, 2003, the ALJ issued an unfavorable decision
10 (Tr. 15-19). The Appeals Council denied review on July 26, 2004
11 (Tr. 4-6), and plaintiff appealed [in case 04cv337-MWL]. On April
12 12, 2005, the Court reversed and ordered remand for further
13 administrative proceedings pursuant to the parties' stipulation
14 (Tr. 357-359). The Appeals Council vacated the ALJ's October 2003
15 decision and ordered consolidation of the March 2002 SSI
16 application with a second application, filed June 26, 2004,
17 pending at the hearing level (Tr. 354-356). The 2004 application
18 alleges the same onset date of March 26, 2002 (Tr. 316).

19 After the Appeals Council's remand order (Tr. 354-356), the
20 ALJ held a second hearing on May 9, 2006 (Tr. 641-652). Although
21 plaintiff was sent notification of the hearing (Tr. 65-370, 375-
22 376), he failed to appear (Tr. 641-642). Counsel told the ALJ his
23 office's last contact with Mr. Depetro was three months earlier,
24 in February of 2006 (Tr. 642). Counsel did not know where
25 plaintiff was or why he failed to appear (Tr. 641-642). The ALJ
26 allowed counsel 30 days to locate his client in order to take Mr.
27 Depetro's testimony at a supplemental hearing. If plaintiff could
28 not be located the ALJ indicated he would probably issue a

1 decision based on the existing record. Counsel agreed to this
2 procedure. (Tr. 642, 651-652.)

3 ALJ Payne acknowledged consolidation of the 2002 and 2004
4 applications (Tr. 316, 641). Psychological expert Allen D.
5 Bostwick, Ph.D., testified and was questioned by counsel and the
6 ALJ (Tr. 643-652).

7 The ALJ notes a letter dated September 12, 2006 (four months
8 after the hearing) was received from plaintiff indicating he did
9 not receive notice of the supplemental hearing (Tr. 316, referring
10 to Tr. 351). Plaintiff's letter indicates his mail was not being
11 forwarded and was homeless for a few months (Tr. 351). Counsel
12 agreed when plaintiff failed to make contact 30 days after the
13 hearing to the ALJ issuing a decision on the existing record (Tr.
14 642, 651-652). On December 29, 2006, ALJ Payne found plaintiff
15 disabled when DAA is included (Tr. 322). When DAA is omitted, ALJ
16 Payne found plaintiff is not disabled, meaning DAA is a
17 contributing factor material to disability (Tr. 323-327). On July
18 14, 2008, the Appeals Council denied review (Tr. 310-312).
19 Therefore, the ALJ's December 29, 2008, decision became the final
20 decision of the Commissioner, which is appealable to the district
21 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
22 for judicial review pursuant to 42 U.S.C. § 405(g) on August 4,
23 2008 (Ct. Rec. 1,4).

24 ///

25 **STATEMENT OF FACTS**

26 The facts have been presented in the administrative hearing
27 transcript, the ALJ's decision, the briefs of both plaintiff and
28 the Commissioner, and are summarized briefly.

1 Mr. Depetro was 41 years old when he applied for benefits on
2 March 26, 2002 (Tr. 293). He attended school through the ninth
3 grade and earned a GED in 2000 (Tr. 82, 133, 295). Plaintiff has
4 worked as a waiter, busboy, dishwasher, cannery worker, child care
5 provider, laborer, and counter person at a coffee house (Tr.
6 77,105,297-299). Mr. Depetro performed "odd jobs" such as
7 painting, roofing, yard work, and retail service, presumably
8 cashiering (Tr. 77,298). Plaintiff divorced after three years of
9 marriage and has no children (Tr. 246, 295). Mr. Depetro states
10 he stopped working when, after he sustained a crushed finger in
11 January of 2000, the employment agency for temporary workers,
12 Labor Ready, stopped calling him (Tr. 76, 295,388). Plaintiff has
13 hepatitis C that has been in remission since June of 2001 (Tr.
14 158,347,529). At the first hearing in October of 2003, Mr.
15 Depetro testified he has sleep problems, depression, and anxiety.
16 He quit using substances (other than alcohol) in January of 2003
17 (Tr. 299-303). He walks, bicycles or takes a bus because he does
18 not have a driver's license (Tr. 303). Activities include
19 watching television 5-6 hours a day, listening to music, buying a
20 newspaper twice a week, and attending NA meetings two to three
21 times a week (Tr. 304-306). Mr. Depetro lives alone, cooks,
22 cleans, does laundry, and shops (Tr. 305-306). Because he did not
23 appear at the second hearing, plaintiff's sole testimony is from
24 the October 2003 hearing.

25 SEQUENTIAL EVALUATION PROCESS

26 The Social Security Act (the "Act") defines "disability"
27 as the "inability to engage in any substantial gainful activity by
28 reason of any medically determinable physical or mental impairment

1 which can be expected to result in death or which has lasted or
2 can be expected to last for a continuous period of not less than
3 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
4 Act also provides that a Plaintiff shall be determined to be under
5 a disability only if any impairments are of such severity that a
6 plaintiff is not only unable to do previous work but cannot,
7 considering plaintiff's age, education and work experiences,
8 engage in any other substantial gainful work which exists in the
9 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
10 Thus, the definition of disability consists of both medical and
11 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
12 (9th Cir. 2001).

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled.
15 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
16 is engaged in substantial gainful activities. If so, benefits are
17 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
18 not, the decision maker proceeds to step two, which determines
19 whether plaintiff has a medically severe impairment or combination
20 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
21 416.920(a)(4)(ii).

22 If plaintiff does not have a severe impairment or combination
23 of impairments, the disability claim is denied. If the impairment
24 is severe, the evaluation proceeds to the third step, which
25 compares plaintiff's impairment with a number of listed
26 impairments acknowledged by the Commissioner to be so severe as to
27 preclude substantial gainful activity. 20 C.F.R. §§
28 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P

1 App. 1. If the impairment meets or equals one of the listed
2 impairments, plaintiff is conclusively presumed to be disabled.
3 If the impairment is not one conclusively presumed to be
4 disabling, the evaluation proceeds to the fourth step, which
5 determines whether the impairment prevents plaintiff from
6 performing work which was performed in the past. If a plaintiff
7 is able to perform previous work, that Plaintiff is deemed not
8 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
9 At this step, plaintiff's residual functional capacity ("RFC")
10 assessment is considered. If plaintiff cannot perform this work,
11 the fifth and final step in the process determines whether
12 plaintiff is able to perform other work in the national economy in
13 view of plaintiff's residual functional capacity, age, education
14 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
15 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

16 The initial burden of proof rests upon plaintiff to establish
17 a *prima facie* case of entitlement to disability benefits.
18 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
19 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
20 met once plaintiff establishes that a physical or mental
21 impairment prevents the performance of previous work. The burden
22 then shifts, at step five, to the Commissioner to show that (1)
23 plaintiff can perform other substantial gainful activity and (2) a
24 "significant number of jobs exist in the national economy" which
25 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
26 Cir. 1984).

27 Plaintiff has the burden of showing that drug and alcohol
28 addiction (DAA) is not a contributing factor material to

1 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9th Cir.
2 2001). The Social Security Act bars payment of benefits when drug
3 addiction and/or alcoholism is a contributing factor material to a
4 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);
5 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9th Cir. 1998). If there
6 is evidence of DAA and the individual succeeds in proving
7 disability, the Commissioner must determine whether the DAA is
8 material to the determination of disability. 20 C.F.R. §§
9 404.1535 and 416.935. If an ALJ finds that the claimant is not
10 disabled, then the claimant is not entitled to benefits and there
11 is no need to proceed with the analysis to determine whether
12 substance abuse is a contributing factor material to disability.
13 However, if the ALJ finds that the claimant is disabled, then the
14 ALJ must proceed to determine if the claimant would be disabled if
15 he or she stopped using alcohol or drugs.

16 STANDARD OF REVIEW

17 Congress has provided a limited scope of judicial review of a
18 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
19 the Commissioner's decision, made through an ALJ, when the
20 determination is not based on legal error and is supported by
21 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
22 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
23 1999). "The [Commissioner's] determination that a plaintiff is
24 not disabled will be upheld if the findings of fact are supported
25 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
26 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
27 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
28 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.

1 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
2 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
3 573, 576 (9th Cir. 1988). Substantial evidence "means such
4 evidence as a reasonable mind might accept as adequate to support
5 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
6 (citations omitted). "[S]uch inferences and conclusions as the
7 [Commissioner] may reasonably draw from the evidence" will also be
8 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
9 On review, the Court considers the record as a whole, not just the
10 evidence supporting the decision of the Commissioner. *Weetman v.*
11 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
12 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

13 It is the role of the trier of fact, not this Court, to
14 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
15 evidence supports more than one rational interpretation, the Court
16 may not substitute its judgment for that of the Commissioner.
17 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
18 (9th Cir. 1984). Nevertheless, a decision supported by
19 substantial evidence will still be set aside if the proper legal
20 standards were not applied in weighing the evidence and making the
21 decision. *Browner v. Secretary of Health and Human Services*, 839
22 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
23 evidence to support the administrative findings, or if there is
24 conflicting evidence that will support a finding of either
25 disability or nondisability, the finding of the Commissioner is
26 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
27 1987).

28 **ALJ'S FINDINGS**

1 At step one ALJ Payne found plaintiff has not engaged in
2 substantial gainful activity since onset (Tr. 319). At steps two
3 and three, he found Mr. Depetro suffers from depression, bipolar
4 disorder, personality disorder, and substance abuse addiction
5 disorder, impairments that are severe but which do not alone or in
6 combination meet or medically equal a Listed impairment (Tr. 319-
7 320). Prior to step four, ALJ Payne assessed an RFC consisting
8 solely of psychological limitations (Tr. 320). At step four, he
9 found Mr. Depetro is unable to perform any past relevant work (Tr.
10 321). At step five, the ALJ found, when DAA is included, there
11 are no jobs plaintiff can perform; accordingly, plaintiff is
12 disabled (Tr. 322). Given plaintiff's DAA, the ALJ went to the
13 second phase of the analysis. He found if Mr. Depetro stopped
14 abusing substances, he would have the RFC to perform past work as
15 a laborer, lawn maintenance worker, and dishwasher (Tr. 326). The
16 ALJ found DAA is a contributing factor material to the disability
17 determination. (Id.) Accordingly, he found plaintiff is barred
18 from receiving benefits and not disabled as defined by the Social
19 Security Act (Tr. 326-327).

20 ISSUES

21 Plaintiff contends the Commissioner erred as a matter of law
22 by improperly weighing the evidence of psychological limitations.
23 Specifically, Mr. Depetro alleges the ALJ failed to properly
24 credit the opinions of examining psychologists Debra Brown, Ph.D.,
25 John McRae, Ph.D., and Frank Rosekrans, Ph.D. (Ct. Rec. 18 at 8-
26 15). Although plaintiff refers to Joyce Everhart, Ph.D.'s
27 opinion, he does not allege the ALJ gave it improper weight (Ct.
28 Rec. 18 at 12-13). Plaintiff also alleges the ALJ improperly

1 relied on the testimony of expert Allen Bostwick, Ph.D. (Ct. Rec.
2 18 at 8-15). The Commissioner asserts the ALJ's decision should
3 be affirmed because it is supported by substantial evidence and
4 free of legal error (Ct. Rec. 24 at 3).

5 DISCUSSION

6 A. Weighing medical evidence

7 In social security proceedings, the claimant must prove the
8 existence of a physical or mental impairment by providing medical
9 evidence consisting of signs, symptoms, and laboratory findings;
10 the claimant's own statement of symptoms alone will not suffice.
11 20 C.F.R. § 416.908. The effects of all symptoms must be
12 evaluated on the basis of a medically determinable impairment
13 which can be shown to be the cause of the symptoms. 20 C.F.R. §
14 416.929. Once medical evidence of an underlying impairment has
15 been shown, medical findings are not required to support the
16 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
17 341, 345 (9th Cr. 1991).

18 A treating physician's opinion is given special weight
19 because of familiarity with the claimant and the claimant's
20 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
21 Cir. 1989). However, the treating physician's opinion is not
22 "necessarily conclusive as to either a physical condition or the
23 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
24 751 (9th Cir. 1989) (citations omitted). More weight is given to
25 a treating physician than an examining physician. *Lester v.*
26 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
27 weight is given to the opinions of treating and examining
28 physicians than to nonexamining physicians. *Benecke v. Barnhart*,

1 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
2 physician's opinions are not contradicted, they can be rejected
3 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
4 If contradicted, the ALJ may reject an opinion if he states
5 specific, legitimate reasons that are supported by substantial
6 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
7 F. 3d 1435, 1463 (9th Cir. 1995).

8 In addition to the testimony of a nonexamining medical
9 advisor, the ALJ must have other evidence to support a decision to
10 reject the opinion of a treating physician, such as laboratory
11 test results, contrary reports from examining physicians, and
12 testimony from the claimant that was inconsistent with the
13 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
14 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
15 Cir. 1995).

16 *1. Rejecting opinions when DAA is included*

17 Plaintiff contends the ALJ erroneously rejected the opinions
18 of examining psychologists Drs. Brown, McRae, and Rosekrans that
19 plaintiff is "severely disabled" to the extent that they have
20 rendered the opinions considering the effects of substance abuse
21 (Ct. Rec. 18 at 8-15). The parties agree the ALJ's reasons for
22 rejecting the examining psychologists's contradicted opinions must
23 be specific, legitimate, and supported by substantial evidence
24 (Ct. Rec. 18 at 14, Ct. Rec. 24 at 15).

25 ALJ Payne found plaintiff disabled when DAA is included (Tr.
26 317,320-322). He accepted the opinions of the examining
27 psychologists to the extent that they opined plaintiff is severely
28 debilitated when substance abuse is included. After he found Mr.

1 Depetro disabled, the ALJ was required to continue the analysis
2 and determine what impairments if any would remain if plaintiff
3 did not abuse substances (Tr. 323-326).

4 When he conducted the second part of his analysis, ALJ Payne
5 rejected the opinions of the examining psychologists, in part,
6 because they included the effects of substance abuse:

7 In terms of the opinion evidence, it is noted
8 that all examining experts who have assessed
9 the claimant as being severely debilitated have
done so considering the effects of his substance
use.

10 (Tr. 326).

11 The ALJ is correct. Opinions based on plaintiff's impairments
12 during periods of use rather than sobriety are simply not relevant
13 to the second part of the analysis, when the ALJ must determine
14 what limitations, if any, remain when plaintiff is drug free. As
15 outlined more fully below, the ALJ's stated reason is specific,
16 legitimate, and supported by substantial evidence.

17 Dr. Brown evaluated plaintiff three times. Her associate
18 conducted a fourth evaluation. At the first evaluation on April
19 16, 2001 (about a year before onset), Dr. Brown noted plaintiff's
20 long history of drug abuse; Mr. Depetro was in school and a DAA
21 treatment program (Tr. 133, 136). She diagnosed PTSD, poly-
22 substance dependence in early remission,¹ and rule out bipolar II

23
24 1

25 Plaintiff's early remission was not sustained. Plaintiff used
26 substances both before and after Dr. Brown's first evaluation.
27 See e.g., heroin (7/15/1999); LSD (8/6/1999); heroin (6/2000);
cocaine and marijuana (2/2002); cocaine (3/2002), and alcohol
28 (6/2002) (Tr. 167, 439, 499, 546, 590, 634). After Dr. Brown's
evaluation in April, plaintiff attended two intake sessions at
Lutheran Counseling Services on June 6 and June 26, 2001, then
failed to return for services. (Tr. 137,149.)

1 disorder. She assessed four marked limitations² (Tr. 134-135).
2 Notably, Dr. Brown's assessed marked limitations included DAA.
3 The ALJ's reason for rejecting her assessed marked limitations
4 (the inclusion of DAA) is specific, legitimate and supported by
5 the evidence, since the assessment does not describe plaintiff's
6 limitations when he is drug-free.

7 At the second evaluation six months later, on October 29,
8 2001 (five months before onset), Dr. Brown noted Mr. Depetro was
9 no longer in school (Tr. 151). She diagnosed antisocial
10 personality disorder, in addition to her previous diagnoses. Dr.
11 Brown assessed the same four marked limitations (Tr. 151, 154-
12 155). Significantly, Mr. Depetro denied using drugs but admitted
13 drinking three times "to intoxication," at some unspecified time
14 between the first and second evaluations. (Tr. 151.) The ALJ's
15 reason for rejecting these marked limitations (the diagnosis
16 included DAA and plaintiff admitted alcohol consumption) is fully
17 supported.

18 At the third evaluation on March 10, 2004 (almost two years
19 after onset), plaintiff "was drinking and occasionally using
20 marijuana" (Tr. 480, 482). Dr. Brown added a rule out diagnosis
21 of alcohol abuse and recommended a new DAA evaluation. She
22 assessed the same four marked limitations (Tr. 484-486), again
23 properly rejected by the ALJ because plaintiff admitted current
24

25 ²Dr. Brown assessed marked impairment in the ability to
26 (a) exercise judgment and make decisions; (b) relate
27 appropriately to co-workers and supervisors; (c) interact
28 appropriately in public contacts, and (d) respond appropriately
to and tolerate the pressures and expectations
of a normal work setting (Tr. 135).

1 DAA.

2 Plaintiff last saw Dr. Brown' associate, Kayleen Islam-Zwart,
3 Ph.D., on March 21, 2005, more than three years after onset (Tr.
4 610-617). Currently plaintiff occasionally uses marijuana and
5 alcohol (Tr. 612). Although she diagnosed PTSD (originally
6 diagnosed April 16, 2001), antisocial personality disorder (first
7 diagnosed October 29, 2001), and rule out diagnoses of bipolar I
8 disorder, alcohol, and cannabis abuse, Dr. Islam-Zwart pointed out
9 an evaluation is needed when plaintiff is abstinent. (Tr. 612).
10 She added a marked limitation in plaintiff's ability to control
11 physical or motor movements and maintain appropriate behavior to
12 Dr. Brown's four previously assessed marked limitations (Tr. 616).
13 Dr. Brown adopted Dr. Islam-Zwart's report. (Tr. 613). Because
14 plaintiff again admitted current substance use, the ALJ properly
15 rejected assessed marked limitations as irrelevant to determining
16 plaintiff's limitations when clean and sober. The reason is
17 specific, legitimate and supported by substantial evidence.

18 Plaintiff argues the ALJ should have credited the limitations
19 assessed in Dr. Brown's first two evaluations because on each
20 occasion plaintiff was clean and sober more than 60 days (Ct. Rec.
21 18 at 13). Citing the opinions of Drs. Rosekrans and Bostwick
22 [discussed below], the Commissioner argues at least six months of
23 abstinence is required to accurately assess drug free
24 psychological functioning (Ct. Rec. 24 at 16, 25-26, referring to
25 Tr. 581,651). The ALJ adopted Dr. Bostwick's opinion and
26 partially credited Dr. Rosekrans's. The opinion of an examining
27 professional such as Dr. Rosekrans, in addition to that of a
28 testifying expert, is a specific, legitimate reason to reject the

1 contradicted opinion of another examining professional such as Dr.
2 Brown. See *Magallanes v. Bowen*, 881 F.2d at 751-752. The
3 Commissioner is correct that the ALJ properly rejected the marked
4 limitations assessed following Dr. Brown's first two evaluations.

5 Dr. McRae evaluated plaintiff three months after onset, on
6 June 25, 2002 (Tr. 167-169). Mr. Depetro drank 3-4 beers two days
7 earlier; sometimes he goes out with friends on weekends and drinks
8 beer (Tr. 167-168). Dr. McRae diagnosed mood disorder NOS,
9 substance dependence in early partial remission (marijuana and
10 cannabis³), alcohol dependence, opioid and amphetamine dependence
11 in full sustained remission, and personality disorder NOS (Tr.
12 167, 169). Dr. McRae opined DAA likely worsens plaintiff's mood
13 states. He opined treatment records during periods of sobriety
14 would be helpful to see how Mr. Depetro functions when he is
15 substance free (Tr. 169). Nearly four years later, on April 20,
16 2006, Dr. McRae added:

17 My opinion (of June 25, 2002) above was that
18 his substance abuse likely worsens his moods and
19 consequently it would have been helpful to have
20 information about his moods and how he functions
21 during clean/dry periods of time. That type of
22 information could help to show to what degree his
23 substance abuse worsens his moods and disrupts his
24 persistence at work tasks and reasonably dealing
25 with others. If there was no evidence from clean/dry
26 periods of time then I would err on the side of the
27 claimant and I would judge his mood/personality
28 interfere with his sustaining social relationships
at work and interfere with sustaining/persisting
at work tasks.

(Tr. 621). Dr. McRae did not further clarify the degree to which
plaintiff's limitations without DAA would interfere with social

³It is unclear why dependence on both marijuana and
cannabis was assessed.

1 relationships or persistence at work tasks. As with Dr. Brown's
2 last two evaluations in March of 2004 and 2005, Dr. McRae assessed
3 plaintiff when he was currently using substances. The ALJ is
4 correct Dr. McRae's opinion does not reflect Mr. Depetro's
5 limitations without DAA.

6 Plaintiff argues the ALJ should have accepted the GAF of 55
7 assessed by Dr. Rosekrans following his September 22, 2005,
8 evaluation (Ct. Rec. 18 at 14, referring to Tr. 575-589). The
9 record shows Mr. Depetro abused drugs and alcohol after treatment
10 in 2000, as Dr. Rosekrans pointed out (Tr. 580). Given
11 plaintiff's roughly 25 years of using methamphetamine, Dr.
12 Rosekrans opined, plaintiff's moods are difficult to evaluate
13 because drugs, "especially meth, cause mood swings" (Tr. 577-578).
14 Among other disorders, Dr. Rosekrans diagnosed four conditions
15 directly related to DAA, all of which he assessed in early *partial*
16 remission: alcohol dependence, amphetamine dependence, opioid
17 abuse, and cannabis abuse. He cautioned that "any diagnosis
18 should be considered somewhat tentative until he [Mr. Depetro] has
19 at least six months abstinence from all drugs, confirmed by
20 urinalysis" (Tr. 580-581)(italics added).

21 The ALJ properly rejected this opinion at the second phase
22 of his analysis because the psychologist diagnosed DAA partially
23 in remission - meaning the assessed limitations included the
24 current use of drugs and alcohol (Tr. 326). And, Dr. Rosekrans's
25 evaluation is provisional since there is no urinalysis testing
26 showing plaintiff maintained six months of sobriety at any time.

27 As part of its remand order, the Appeals Council instructed
28 the ALJ to order a neuropsychological consultative examination

1 with testing (Tr. 355, 357-358); accordingly, Dr. Everhart
2 evaluated plaintiff on February 1, 2006 (Tr. 593-602). After
3 testing she diagnosed malingering, depressive disorder NOS
4 (somewhat controlled with celexa), and personality disorder NOS
5 with antisocial features. Dr. Everhart also diagnosed cocaine,
6 marijuana, methamphetamine, opioid, and alcohol dependence in
7 sustained full remission by self-report "of questionable
8 credibility." (Tr. 599-600.) She did not specifically assess
9 work-related limitations. Plaintiff does not specifically assign
10 error the weight the ALJ gave Dr. Everhart's opinion.

11 The ALJ relied in part on Dr. Bostwick's assessed limitations
12 with and without DAA (Tr. 320-326, referring to Tr. 635-638) when
13 he weighed the examining psychologists' contradicted opinions, as
14 well as when he determined plaintiff's RFC, excluding DAA. ALJ
15 Payne found, again excluding DAA, plaintiff is moderately limited
16 in the ability to ask simple questions and request assistance; he
17 is also moderately limited in the ability to accept instruction
18 and respond appropriately to criticism from supervisors (Tr. 323,
19 326). The ALJ points out Dr. Bostwick opined plaintiff's
20 depressive disorder (when DAA is excluded) causes only occasional
21 mild limitations in stress tolerance and sustained concentration,
22 because it is relatively well-controlled with celexa (Tr. 326,
23 referring to Tr. 625, 637). The record supports Dr. Bostwick's
24 opinion.

25 To further aid in weighing the conflicting medical
26 evidence, the ALJ evaluated plaintiff's credibility and found him
27 less than fully credible (Tr. 325), a finding not challenged on
28 appeal. Credibility determinations bear on evaluations of medical

1 evidence when an ALJ is presented with conflicting medical
2 opinions or inconsistency between a claimant's subjective
3 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.
4 3d 683, 688 (9th Cir. 2005).

5 It is the province of the ALJ to make credibility
6 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
7 1995). However, the ALJ's findings must be supported by specific
8 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
9 Cir. 1990). Once the claimant produces medical evidence of an
10 underlying medical impairment, the ALJ may not discredit testimony
11 as to the severity of an impairment because it is unsupported by
12 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
13 1998). Absent affirmative evidence of malingering, the ALJ's
14 reasons for rejecting the claimant's testimony must be "clear and
15 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
16 "General findings are insufficient: rather the ALJ must identify
17 what testimony not credible and what evidence undermines the
18 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
19 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

20 Despite Dr. Everhart's malingering diagnosis, the Court asks
21 if the ALJ's credibility determination is based on clear and
22 convincing reasons. Some of the factors the ALJ relied when he
23 assessed credibility include: (1) plaintiff responded positively
24 to prescribed medication and counseling, contradicting disabling
25 psychological impairment when DAA is excluded. (Tr. 325,
26 referring to Tr. 253,262,462); (2) The record reflects during
27 periods of reported abstinence, treatment providers describe
28 plaintiff's mood and affect as normal. (Tr. 325-326, referring to

Tr. 203, 524; see also Tr. 144, 247); and (3) Plaintiff's paid activities during reported periods of abstinence included removing wallpaper, sanding walls, painting, and yard work. The ability to do this work undermines plaintiff's claims of disabling impairment as well as his credibility. (Tr. 324-326, referring to Tr. 228, 542.) The Court finds ALJ Payne's reasons for finding plaintiff less than fully credible are clear, convincing, and fully supported by the record. See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir. 2002) (proper factors include inconsistencies in plaintiff's statements, inconsistencies between statements and conduct, and extent of daily activities). Noncompliance with medical care or unexplained or inadequately explained reasons for failing to seek medical treatment also cast doubt on a claimant's subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F. 2d 597, 603 (9th Cir. 1989).

B. Evidence supports the ALJ's RFC determination

1. Observations of treating sources and plaintiff's activities support the ALJ's RFC when DAA is excluded

Evidence supports the ALJ's finding that, absent DAA, plaintiff's limitations are moderate at most. The ALJ points out (a) when drug free, Mr. Depetro responded positively to prescribed medication and counseling, contradicting allegedly ongoing disabling psychological impairment (Tr. 325; Tr. 253,262,462). (b) As indicated, the record shows treatment providers describe plaintiff's mood and affect as normal when he is abstinent (Tr. 326, referring to Tr. 144, 203, 247, 524). (c) Plaintiff's additional activities during claimed periods of sobriety include expressing the desire to attend school or get a job (Tr. 324

1 citing Tr. 234); applying "for training at Pre-Voc" (Tr. 324,
2 citing Tr. 219); and discontinuing mental health counseling (Tr.
3 324, referring to Tr. 462).

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6 *2. Plaintiff's descriptions of his limitations with and*
7 *without DAA support the ALJ's determination*

8 Plaintiff's statements indicate he does well when abstinent.
9 ALJ points out a few of plaintiff's acknowledgments his depression
10 and personality are generally controlled when he is abstinent and
11 takes medications as prescribed: zoloft effectively relieves
12 depression, anxiety and irritability (8 months without drinking,
13 6/6/01); paxil and zyprexa somewhat reduce anger, irritability and
14 frustration (admits some drinking, 6/25/02); mental health
15 counseling helped plaintiff "feel better" (3 months clean from
16 injecting drugs, 2/26/03); celexa helpful in controlling
17 depression; has a more positive outlook (4 months without
18 injecting, May 2003); celexa making a "big difference" (alleges 5
19 months of abstinence, June of 2003); and doing well and
20 maintaining relationship with a girlfriend "although drinking a
21 little occasionally" (alleges 8 months of abstinence, September of
22 2003). (Tr. 320, 323-324, citing Tr. 157, 167, 229, 236-237, 253,
23 262, 459.)

24 The ALJ observes plaintiff recognizes the negative effects of
25 DAA in his functioning, another important source of evidence
26 relied on when assessing plaintiff's RFC. In June of 2001,
27 plaintiff reported not drinking for 8 months; ALJ Payne notes Mr.
28 Depetro reported his past suicidal gestures had always occurred

1 under the influence of alcohol or drugs. (Tr. 320, 323, referring
2 to Exhibit 6F/1.) The ALJ notes plaintiff described the effects
3 of DAA on his functioning a year later:

4 [In June of 2002 plaintiff] reported that alcohol
5 had interfered with relationships, caused legal problems
6 and interfered with his getting things done . . . [He]
7 admitted that his drug use had interfered with work.

8 (Tr. 320-321, referring to Exhibit 9F/1).

9 The ALJ observes on October 4, 2002⁴, a substance abuse
10 counselor opined plaintiff "experienced serious consequences from
11 his addictions, including lost relationships, lost housing and
12 lost jobs," and moved from coast to coast as a result of his
13 addictions⁵ (Tr. 321, referring to Tr. 126,417).

14 In January of 2003, plaintiff admitted recently injecting
15 cocaine. The ALJ notes Mr. Depetro sought hospitalization at the
16 time due to racing thoughts and "going downhill" (Tr. 321,
17 referring to Tr. 216-217).

18 On March 14, 2003, plaintiff admitted he experienced legal,
19 job and relationship problems due to DAA (Tr. 321, referring to
20 Tr. 254).

21 In August of 2004, Mr. Depetro admitted he recently used
22 methamphetamine. The record is unclear as to when plaintiff
23 started using drugs prior to August; the ALJ observes that, in
24 June of 2004, two months earlier, Mr. Depetro began reporting

25 ⁴It appears the date should be October 4, 2000, rather
26 than 2002. The Court deems the error harmless.

27 ⁵Earnings records from 1985 through 2000 show plaintiff
28 lived in 19 cities in 11 states, including Illinois, Alabama,
Ohio, Washington, California, Wisconsin, Alaska, Oklahoma,
Texas and Arizona (Tr. 382-386). In 2007, plaintiff expressed
a desire to return to the Portland area (Tr. 345).

1 increased feelings of isolation and anger. (Tr. 321, referring to
2 Exhibit 24F/19). The ALJ's RFC when DAA is excluded is supported
3 by plaintiff's statement to Dr. Rosekrans in 2005 that he "has
4 been called paranoid, but when you are selling drugs to support
5 yourself and your drug habit, and have a pocket full of
6 meth[amphetamine], it is realistic to be afraid of everything
7 around you." (Ct. Rec. 24 at 24, citing to Tr. 575.) Plaintiff
8 reported first experiencing manic-like symptoms in 1996 or 1997
9 (Tr. 536), a time when he was apparently using methamphetamine.
10 Dr. Rosekrans opined the drug causes manic-like symptoms (Tr.
11 576). The ALJ observes Mr. Depetro was arrested numerous times
12 over the years for DAA-related actions including shoplifting, drug
13 possession, drunkenness, attempting to receive stolen property,
14 criminal trespass, and open container violations (Tr. 321,
15 referring to Tr. 576).

16 Plaintiff told Dr. Everhart problems keeping a job for any
17 length of time were probably drug and alcohol related (Tr. 596-
18 597).

19 When DAA is excluded, the ALJ assessed plaintiff as no more
20 than moderately limited in the ability to perform work related
21 tasks (Tr. 323). The degree of assessed limitation is supported
22 by Dr. Bostwick's opinion and other evidence, as noted.

23 The ALJ is responsible for reviewing the evidence and
24 resolving conflicts or ambiguities in testimony. *Magallanes v.*
25 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
26 trier of fact, not this court, to resolve conflicts in evidence.
27 *Richardson*, 402 U.S. at 400. The court has a limited role in
28 determining whether the ALJ's decision is supported by substantial

1 evidence and may not substitute its own judgment for that of the
2 ALJ, even if it might justifiably have reached a different result
3 upon de novo review. 42 U.S.C. § 405 (g).

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's conclusions, this
6 Court finds that the ALJ's decision is free of legal error and
7 supported by substantial evidence..

8 **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 23**) is
10 **GRANTED.**

11 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
12 **DENIED.**

13 The District Court Executive is directed to file this Order,
14 provide copies to counsel, enter judgment in favor of Defendant,
15 and **CLOSE** this file.

16 DATED this 1st day of December, 2009.

17
18 s/ James P. Hutton

19 JAMES P. HUTTON
20 UNITED STATES MAGISTRATE JUDGE
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